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No. 10-38

Supreme Court, U.S.
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In The
Supreme Court of the United States

HILLARY L. FALCONER and
D.W. FALCONER, INC., dba BRIARCLIFF FARM,

Petitioners,

v.

COUNTY OF SANTA CRUZ, COUNTY OF SANTA CRUZ BOARD OF SUPERVISORS, JANET K. BEAUTZ, DAVID LAUGHLIN and RICHARD NIEUWSTAD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When government records a Notice of Violation against one's property without a due process hearing before or after the recording, with a serious deprivation of property rights, does the Statute of Limitations begin with the recording or do applicable concepts such as null and void *ab initio*, equitable tolling or equitable estoppel toll any statute of limitations pending a due process hearing and a further recording based thereon?

LIST OF PARTIES

The caption of this case in this court contains the names of all parties. Former defendant Nancy Cole was dismissed by plaintiff at the beginning of this case. A notice pursuant to the court's Rule 12.6 that Nancy Cole has no interest in the outcome of the petition has been filed contemporaneously herewith with copy sent to Nancy Cole. Petitioner D. W. Falconer, Inc., pursuant to Rule 29.6, states that it is a privately held company and has no parent corporation. There is no publicly held corporation that owns more than 10% of its stock. Petitioner Hillary Falconer is its sole shareholder.

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The opinions of the October 24, 2008 Order Granting Defendants' Motion For Summary Judgment of the United States District Court for the Northern District of California, San Jose Division was not reported (*see* App. 4 hereto). The opinion of the United States Court of Appeals for the Ninth Circuit panel was not selected for publication and is not reported in the Federal Reporter but is unofficially reported at 2010 WL 675247 (*see* App. 1 hereto). The April 2, 2010 Order Denying Appellants' Petition For Rehearing En Banc is contained in App. 15 hereto.

JURISDICTION

The decision of the United States Court of Appeals panel for the Ninth Circuit, affirming the decision of the District Court's Order Granting Defendants' Motion for Summary Judgment was issued on February 23, 2010. A timely Petition for Rehearing En Banc was denied on April 2, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ".

United States Constitution, Amendment XIV, § 1

"Nor shall any state deprive any person of life, liberty or property, without due process of law . . . ".

California Constitution, Art. I, § 7(a)

"A person may not be deprived of life, liberty, or property without due process of law . . . ".

42 U.S.C. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ".

42 U.S.C. § 1988(b)

"In any action or proceeding to enforce a provision of section . . . 1983, . . . the court, in its discretion, may allow the prevailing party,

other than the United States, a reasonable attorney's fee as part of the costs . . . ".

STATEMENT OF THE CASE

Petitioners filed a verified complaint in superior court, County of Santa Cruz (County), on June 13, 2006. Plaintiffs'-Appellants' Excerpts of Record [ER] at 148-173. On July 7, 2006 respondents filed a Notice of Removal to Federal Court pursuant to 28 U.S.C. § 1441(b). Petitioners moved for remand on July 28, 2006. Petitioners' motion was denied on November 9, 2006 and the case remained in the U.S. District Court for the Northern District of California, San Jose Division, Judge James Ware.

The county moved for summary judgment or partial summary judgment on August 3, 2007. Petitioners opposed the motion. ER at 19-37. A hearing was held on June 2, 2008. ER at 11-13. On October 24, 2008 Judge Ware granted respondents' Motion for Summary Judgment, dismissing the case and all causes of action therein only on ripeness grounds, without prejudice to refiling. ER at 3-9. Mrs. Falconer and Briarcliff Farm appealed only the procedural due process cause of action.

The Court of Appeals for the Ninth Circuit panel conducted oral argument on February 10, 2010 and on February 23, 2010 issued its three-page Memorandum decision (App. 1 hereto). In doing so, the

panel stated that "the harm alleged by Falconer is the reduction of property value due to the recording of the Notice of Violation in the real property records without constitutionally adequate procedure." (Page 2 of Memorandum decision). The panel concluded that "Falconer's due process claim became ripe when the county's decision became final . . . which occurred at the time the county recorded notices of violation in 1998 and 2002. . . . The claim is barred by the applicable one-year statute of limitations." *Id.* The Statute of Limitations defense was first raised in the Court of Appeals for the Ninth Circuit.

In doing so, the panel concluded "Thus Falconer knew that the County took value from her property by recording the Notice of Violation" and would not give her a post-deprivation hearing as of September 19, 2000. *Id.* The panel rejected Falconer's position based on the continuing wrongs doctrine, equitable estoppel and equitable tolling. *Id.* p. 3.

FACTUAL STATEMENT

Briarcliff Farm is located in Santa Cruz County, California. ER at 149. It is a 12¾ acre ranch, which has been used for boarding, breeding and training horses since 1959, or at least 1963 by the county's findings. ER at 196. Hillary Falconer's parents purchased the farm in 1959. ER at 151. In 1975, Hillary and Don Falconer purchased the farm, incorporating as D.W. Falconer, Inc., dba Briarcliff Farm. *Id.*

Until 1997, Briarcliff Farm was used by private groups as well as public officials as an example of how to best manage and maintain a horse facility. ER at 149.

On October 20, 1997, Code Compliance officer Richard Nieuwstad made a site visit to Briarcliff Farm. ER at 186, 188. He placed over 50 red tags all over the property, ER at 108, alleging an illegal horse boarding operation and various illegal structures. ER at 107-108. The Notice of Violation stated:

> WARNING! IF THE VIOLATION IS NOT CORRECTED BY THE DATE INDICATED, IT IS THE INTENTION OF THE COUNTY TO RECORD A NOTICE OF VIOLATION ON THE PROPERTY TITLE. YOU HAVE 20 DAYS FROM THE DATE OF THIS NOTICE IN WHICH TO REQUEST A MEETING WITH CODE COMPLIANCE STAFF TO PRESENT EVIDENCE THAT A VIOLATION DOES NOT EXIST.
>
> WARNING! IF THE CORRECTIVE ACTION INDICATED ABOVE IS NOT COMPLETED BY THE DATE INDICATED, THIS MATTER WILL BE RECOMMENDED FOR ADMINISTRATIVE HEARING TO CONSIDER THE IMPOSITION OF CIVIL PENALTIES, ENFORCEMENT COSTS, AND OTHER APPROPRIATE ENFORCEMENT ORDERS. (SEE SANTA CRUZ COUNTY CODE CHAPTER 1.12).

ER at 187.

Nieuwstad followed up with a letter in which he interpreted the 20 days referenced above as a time limit on correcting the alleged violations rather than on contesting their merit. ER at 188. The 20 days to correct the violations were replaced by 60 days to perform tasks. The Falconers did hire a land use consultant and apply for permits as instructed. ER at 4-5, 106, 193. Meanwhile, the County gave no hearing, let alone a due process hearing on the merits of the alleged code violations. ER at 7:15-16. Mrs. Falconer later requested a hearing, ER at 67, 99, which the County scheduled, but ultimately abandoned. ER at 18. As it turns out, this hearing would not have provided due process as to recording the red tags anyway. *Id.* The County recorded the Notices of Violation against Briarcliff in 1998, and again in 2002. ER at 134, 136.

According to research conducted by Nieuwstad on May 25, 1999, Briarcliff's horse operation would be deemed grandfathered. ER at 106 following "05/25/99" ("researched old zoning ordinances w/Glenda Hill and it was determined that the first Ordinance regulating commercial horse boarding came in to effect on 11.23.82 (#3344) requiring that when more than 2 horses/acre are boarded a Use Permit is required"). The Falconers and their counsel first became aware of this research through the deposition of Nieuwstad on June 18, 2007. ER at 104-105. Nieuwstad also testified that there is no limit on the number of horses on property of more than 10 acres. ER at 111:16-19. *See also* ER at 196 (County's finding

of a preexisting horse-boarding operation). Briarcliff Farm is 12¾ acres. ER at 149. Despite this knowledge, the County has never expunged the red tags for the horse operation, ER at 109, among the other alleged violations, which have yet to be determined. ER at 7:15-16.

The County has a policy of refusing to lift red tags, even temporarily, no matter the purpose or precautions taken. ER at 106, 112-113. Even should the property owner need financing to repair a legitimate code violation or establish that no manure was involved as alleged by the county, the county will not lift the red tags to foster that opportunity. *Id.*

The Falconers made every attempt to resolve what were, and still remain today, only alleged violations. ER at 7:15-16, 119-120. Don Falconer died of a heart attack three years into this experience, leaving Hillary Falconer responsible for everything. ER at 149:23-24.

Mrs. Falconer has paid substantial money to the county, her land use consultant, and her attorneys, ER at 106, 194, to handle what are still only *alleged* code violations, ER at 7:15-16, 119-120, and to resolve matters in good faith. As the years have passed, she has never been able to borrow against the farm because of the recorded red tags. ER at 28, 116-117, 154. Without financing, she has been unable to do repairs or upgrades and has had to reduce staff making it a severe hardship to compete and sustain the farm. She also was ineligible for other permits unless she first

took care of the alleged violations. ER at 6. *Id.* She finally came to the conclusion that she should sell the farm and price it below appraised value for a quick sale. At least five buyers were very interested at a price of $3 million, but then each dropped out one by one after contacting the County. ER at 153-154.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE SUPREME COURT RULE 10 CONFLICTS CONSISTING OF THE PANEL'S MEMORANDUM DECISION WITH AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT (RULE 10(c)); THE PANEL DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS BY A STATE COURT OF LAST RESORT (THE CALIFORNIA SUPREME COURT) (RULE 10(a)); THE PANEL HAS EVEN DEPARTED FROM DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER (RULE 10(a)); AND THE PANEL'S MEMORANDUM DECISION HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER (RULE 10(a)).

A. Conflicts with decisions of the United States Supreme Court (Rule 10(c)).

Most important is the conflict of the Ninth Circuit Court of Appeals panel and this Court's decision in *Irwin v. Department of Veterans Affairs, et al.*, 498 U.S. 89, 93-96 (1990). In *Irwin* Chief Justice Rehnquist, speaking for the court, stated as follows:

The fact that petitioner did not strictly comply with *§ 2000e-16(c)*'s filing deadline does not, however, end our inquiry. Petitioner contends that even if he failed to timely file, his error may be excused under equitable tolling principles. The Court of Appeals rejected this argument on the ground that the filing period contained in *§ 2000-16(c)* is jurisdictional, and therefore the District Court lacked authority to consider his equitable claims. The court reasoned that *§ 2000-16(c)* applies to suits against the Federal Government and thus is a condition of Congress' waiver of sovereign immunity. Since waivers of sovereign immunity are traditionally construed narrowly, the court determined that strict compliance with *§ 2000-16(c)* is a necessary predicate to a Title VII suit. . . .

The phraseology of this particular statutory time limit is probably very similar to some other statutory limitations on suits against the Government, but probably not to all of them. In the present statute, Congress said that '[w]ithin thirty days . . . an employee . . . may file a civil action. . . .' In *Soriano, supra, 352 U.S. at 271, n.1, 77 S.Ct. at 270, n.1*, Congress provided that '[E]very claim . . . shall be barred unless the petition . . . is filed . . . within six years. . . . ' An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to

the availability of equitable tolling. Thus a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.

Time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.' *(Citation omitted.)* Indeed, we have held that the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling.

A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' *(Citations omitted.)* Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of

course, may provide otherwise if it wishes to do so. *Id.* at 93-96.

It is very pertinent that the six-year statute of limitations cited above in *Irwin* is the same six-year statute relied upon by the subject Ninth Circuit panel in citing *Nesovic v. United States*, 71 F. 3d 776, 778 (9th Cir. 1995) as its authority regarding the subject six-year statute as well as the inapplicable ability of the other cases relied upon to evaluate the applicability of equitable tolling and equitable estoppel.

The county's argument herein that no hearing is required also conflicts with this Court's rulings. *See* Appellees' Supplement ER at 456:2-7 and 457:2-7 ("We disagree fundamentally with the idea that they are entitled to a hearing before we record"). The U.S. Supreme Court "usually had held that the Constitution requires some kind of hearing *before* the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (emphasis in original). *See also Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). *See also Sniadich v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring) ("since this deprivation [of the use of garnished wages] cannot be characterized as de minimis, [Ms. Sniadich] must be accorded the usual requisites of procedural due process: notice and a *prior* hearing.") (Emphasis added).

B. Conflicts with the California Supreme Court (Rule 10(a)).

The Ninth Circuit panel similarly conflicts with the rulings of the California Supreme Court. This can

best be described by the California Supreme Court decisions in the 1970's when the California Supreme Court described equitable tolling while stating:

> It is fundamental that the primary purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available. '[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.' . . . We have previously indicated that the equitable tolling doctrine fosters the policy of the law of this state which favors avoiding forfeitures and allowing good faith litigants their day in court. (2b) As with other general equitable principles, application of the equitable tolling doctrine requires a balancing of the injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by the Tort Claims Act limitations statute. *(Cases omitted).*

Addison v. State of California, 21 Cal. 3d 313, 317, 320-321 (1978).

See also the decision in *Elkins v. Derby,* 12 Cal. 3d 410, 414-420 (1974). In the subject case the county recorded their Notice of Violation in 1998 and 2002 and the Ninth Circuit panel concluded the Statute of Limitations ran one year later (App. 2). However, the parties continued with their settlement negotiations, the county never denied their request for a due process hearing, and there is no evidence that

prejudice was being caused to the county during this period. According to Judge Ware (App. 7): "After attempting to schedule hearings on Plaintiff's application, during the next several years, Defendants placed enforcement of Plaintiff's code violation on inactive status . . .". However, there is no evidence that notice was ever provided to petitioners that the county had abandoned providing a hearing. This constituted a wrongful, misleading silence as negotiations continued. *See Shoenberg v. County of Los Angeles Assessment Appeals Board*, 179 Cal. App. 4th 1347, 1356 (2009). Equitable tolling clearly was the policy of the California Supreme Court under such facts beginning long ago in the 1970's.

C. Conflicts within its own Ninth Circuit and need to exercise the Court's supervisory power (Rule 10(a)).

The panel's decision even conflicts with its own Ninth Circuit. *See Cedars-Sinai Medical Center v. Shalala,* 125 F. 3d 765, 790 (C.A. 9 (Cal.) 1997) where the Ninth Circuit discusses the *Irwin* and *Nesovic* decisions.

In *Levine v. City of Alameda*, 525 F. 3d 903, 906 (9th Cir. 2008), the court found that a "Director of Human Resources' offer to meet with Levine [a discharged civil servant] to discuss [the] lay off procedure . . . failed to give Levine a meaningful opportunity to respond to the lay off decision." A pretermination hearing was required. *Id.* Similarly here,

with the livelihood of Mrs. Falconer at stake, a suggestion to request a meeting with code compliance staff is not a meaningful pre-deprivation hearing. Procedural due process requires an impartial hearing before an independent hearing officer prior to the government taking private property interests from a private property owner by recording *alleged* code violations (red tags) against the title to the property.

In *Harris v. County of Riverside*, 904 F. 2d 497, 504 (C.A. 9 (Cal.) 1990) for lack of procedural due process, the Ninth Circuit Court found "invalid *ab initio*" a County's act of rezoning the plaintiff's land. Similarly, Hillary Falconer's recorded violations were null and void *ab initio* and of no legal effect.

These examples departing from decisions of the Ninth Circuit call for an exercise of this Court's supervisory power under Rule 10(a).

CONCLUSION

Due process in our country is cherished and symbolizes the freedom and liberty that we all share. It distinguishes our way of life from so many other countries. However, some courts in our nation get mired down when dealing with these subjects, especially when private property rights are an issue. Rather than evaluating justice and fairness, they take a narrow view, particularly when government is one of the parties. The subject action is an example of

the courts losing perspective as to the relationship of private property rights to basic freedom.

For over twelve years, the petitioner, Mrs. Hillary Falconer, has been subjected to a recorded county notice of alleged violations concerning her 12¾ acre horse farm and related activities. Over fifty alleged violations were recorded. No due process hearing was scheduled prior to the County of Santa Cruz, California, recording the alleged violations. Furthermore, even though requested by Mrs. Falconer, no post deprivation hearing was ever scheduled.

A meeting with enforcement staff was offered but under the recent Ninth Circuit decision in *Levine (supra)* that doesn't count as a due process hearing. The Ninth Circuit Court ruled based on *Nesovic (supra)* as authority that the subject statute of limitations was not variable and held that the statute ran one year after recording. However, this Court had already ruled in *Irwin (supra)* that flexible rules are applicable in applying the due process clause, including defenses such as equitable tolling and estoppel. Nonetheless Mrs. Falconer is presently subject to a Ninth Circuit decision that the subject recorded allegations shall remain even though the evidence developed in discovery indicated that her whole horse operation preceded the imposition of permit requirements and Mrs. Falconer's horse operation was fully grandfathered.

The County of Santa Cruz took the position in court that it did not have to provide any, let alone a due process hearing. They failed to recognize that once alleged information was recorded, Mrs. Falconer could no longer obtain financing on her horse farm and could not sell her farm. She had received five highly interested potential purchasers in the 3 million dollar plus range who all pulled out when confronted with the County and its recording of the alleged violations. She could not obtain any other permits on her property as long as the recorded alleged violations remained. She has suffered a serious deprivation of her property rights.

This case may seem to some to be insignificant and not worthy of this Court's attention. The lower opinions are not published, and there are Ninth Circuit and Supreme Court decisions that should have been followed. However, it is time to stop these intrusions on property rights and show them for what they are.

Totally ignored by the Ninth Circuit is its own decision that government action which denies due process is null and void *ab initio. Harris v. County of Riverside,* 904 F. 2d at 504 (9th Cir. 1990). If it is void, how could the statute of limitations start running? This is a classic example of equitable tolling that should estop the county from further enforcement until an appropriate due process hearing takes place and a further recording of any proven infraction.

These arguments for a just and equitable result were raised throughout these proceedings and are worthy of consideration by this Court and its responsibility for the law of this land. Mrs. Falconer is an example of the people in our country who suffer from the denial of due process and who most lack the resources to stand up to over-regulation or the taking of private property rights by government or other powerful individuals or groups. A decision in her favor would be a guide to all courts and citizens, including deprived property owners in Santa Cruz County.

Mrs. Falconer has done more than could be reasonably expected of any citizen subjected to land use regulation. She is the widowed owner of a horse farm that should be celebrating its 50th anniversary in her family and in her community this year. Instead, her farm, livelihood, and home are on the verge of shutting down due to the County's abusive conduct.

Mrs. Falconer's procedural due process claim is ripe, not subject to exhaustion, and is not time-barred for many reasons. This Court should reverse the circuit court and toll the Statute of Limitations pending a due process hearing before an independent hearing officer and a further recording based thereon and direct an award of fees and costs to Mrs. Falconer for vindication of her federal civil right to procedural due

process, and order the County to expunge the red tags as void.

Respectfully submitted,

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DATED: June 30, 2010

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HILLARY L. FALCONER; D.W. FALCONER, INC., DBA Briarcliff Farm, Plaintiffs-Appellants, v. COUNTY OF SANTA CRUZ; COUNTY OF SANTA CRUZ BOARD OF SUPERVISORS; JANET K. BEAUTZ; DAVID LAUGHLIN; RICHARD NIEWSTAD; NANCY COLE, Defendants-Appellees.	No. 08-17661 D.C. No. 5:06-cv-04240-JW MEMORANDUM* (Filed Feb. 23, 2010)

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted February 10, 2010
San Francisco, California

Before GOODWIN, BERZON and IKUTA, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

The harm alleged by Falconer is the reduction of property value due to the recording of the notice of violation in the real property records without constitutionally adequate procedure. Falconer's due process claim became ripe when the County's decision became final, *see Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990), which occurred at the time the County recorded notices of violation in 1998 and 2002, Santa Cruz County, Cal., Code § 19.01.080 (2009). The statute of limitations for challenging this alleged due process violation accrued when Falconer knew or "ha[d] reason to know of the injury that is the basis of [her] action." *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002). Falconer knew that the County had recorded the notice of violation against her property on September 19, 2002, which is when the County sent notice of the recording to Falconer's attorney. That notice also referred Falconer to Santa Cruz County Code § 19.01.080, which states that "[t]he Planning Director's decision is final and not subject to further appeal." Thus, Falconer knew that the County took value from her property by recording the notice of violation and would not give her a post-deprivation hearing as of September 19, 2002. Because Falconer did not file suit against the County until 2006, the claim is barred by the applicable one-year statute of limitations. Cal. Civ. Proc. Code § 340(3) (2002).

Contrary to Falconer's argument, the continuing wrongs doctrine does not apply because the alleged

illegal act, which was the recording of the notice of violation without adequate hearing, was a discrete event that led to the present dispute. *See Nesovic v. United States,* 71 F.3d 776, 778 (9th Cir. 1995) (explaining when the continuing wrongs doctrine applies). In addition, Falconer's assertion that the running of the statute of limitations must be tolled by equitable estoppel fails because Falconer was not "ignorant of the true state of facts" and could have pursued her judicial remedies after she was notified of her injury in 2002. *See Javor v. Taggart,* 120 Cal. Rptr. 2d 174, 179-80 (Cal. Ct. App. 2002). Finally, Falconer is not entitled to equitable tolling because she does not allege that the County made a false representation or engaged in a misleading silence that prevented her from pursuing her claim related to the recording of the notice of violation. *See Schoenberg v. County of L.A. Assessment Appeals Bd.,* 102 Cal. Rptr. 3d 86, 93 (Cal. Ct. App. 2009).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Hillary L. Falconer, et al.,

Plaintiffs,

v.

County of Santa Cruz, et al.,

Defendants.

NO. C 06-04240 JW

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 24, 2008)

I. INTRODUCTION

Hillary L. Falconer and D.W. Falconer, Inc., d.b.a. Briarcliff Farm (collectively, "Plaintiffs") bring this civil rights action pursuant to 42 U.S.C. § 1983 against the County of Santa Cruz and various other Defendants[1] (collectively, "Defendants"). Plaintiffs allege that Defendants violated their rights under the Fifth and Fourteenth Amendments by recording building code violations against their property without due process.

Presently before the Court is Defendants' Motion for Summary Judgment, (hereafter, "Motion," Docket Item No. 28.) The Court conducted a hearing on June 2, 2008. Based on the papers submitted to date and

[1] Other Defendants are the Santa Cruz Board of Supervisors, Supervisor Janet K. Beautz, and Santa Cruz Administrative Employees David Laughlin and Richard Nieuwstad.

oral argument, the Court GRANTS Defendants' Motion for Summary Judgment.

II. BACKGROUND

A. Undisputed Facts

Plaintiff D.W. Falconer Inc., d.b.a. Briarcliff Farm, is a horse farm in Santa Cruz County,[2] Plaintiff Hillary Falconer has operated Briarcliff since 1975, (*Id.*) The farm is approximately 12.75 acres, and contains a main house, a swimming pool, eight barns, two arenas, pastures, fencing, buildings for hay and feed storage, and a bunkhouse used for employee housing.[3]

On November 4, 1997, Defendants issued a "Notice of Building Code Violation and Intent to Record" (hereafter, "November 1997 Notice").[4] The November 1997 Notice identified several structures that had been built on Briarcliff Farm without proper permits. *Id.* The November 1997 Notice also identified a large quantity of manure and debris that had

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[2] (Declaration of Julia Hill in Support of Defendants' Motion for Summary Judgment, hereafter, "Hill Decl.," Ex. A, Complaint for Declaratory and Injunctive Relief, Inverse Condemnation, Fraud, Violation of Civil Rights, Conflict of Interest, and Punitive Damages ¶ 3, hereafter, "Complaint," Docket Item No. 31; Motion at 1.)

[3] (Hill Decl., Ex. B, Deposition of Hillary Falconer at 13-22, hereafter, "Falconer Decl.;" Motion at 2.)

[4] (Declaration of Michael Dever, hereafter, "Dever Decl.," Ex. B, hereafter, "November 1997 Notice," Docket Item No. 32.)

been dumped close to a creek running through the property. *Id.* Defendants granted Plaintiffs sixty days to resolve the violations by removing the manure and debris and applying for a discretionary permit for the buildings. (Dever Decl., Ex. C.) On May 19, 1998, Defendants recorded the building code violations against the property. (Dever Decl., Ex. D.)

On June 11, 1998, Plaintiffs submitted a Development Permit Application ("Application") to the Santa Cruz County Planning Department to resolve the code violations. (Dever Decl., Ex. E.) Plaintiffs' Application was sent to the Soquel Creek Water District, the State Water Quality Control Board, the State Fish & Game Board, and Defendant Janet Beautz for comments.[5] (Dever Decl., Ex. F.)

On May 25, 1999, Defendants informed Plaintiffs that they had not received additional information which was required to complete their Application. (Dever Decl., Ex. H.) Plaintiffs were required to submit the additional information by June 15, 1999 or their Application would be considered abandoned. (*Id.*) Plaintiffs submitted the additional information and the revised Application was again circulated to various agencies and Beautz. (Dever Decl., Ex. I.)

On August 18, 1999, Defendants sent a letter to Plaintiffs stating that the Application was still

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[5] Beautz is a Santa Cruz County Supervisor for the district in which Briarcliff Farm is located. (Complaint ¶ 6; Answer ¶ 6, Docket Item No. 2.)

incomplete. (Dever Decl., Ex. K.) The letter identified several defects in the proposed plan and instructed Plaintiffs on the additional steps that should be taken to resolve those deficiencies. (*Id.*) The letter also notified Plaintiffs that they had a right to appeal the determination of incompleteness. (*Id.*)

After attempting to schedule hearings on Plaintiffs' Application, during the next several years, Defendants placed enforcement of Plaintiffs' code violations on inactive status. (Declaration of Spencer Nutter, hereafter, "Nutter Decl.," Ex. 1 at 6, Docket Item No. 54.) In May 2006, Plaintiffs' Real Estate Agent contacted Defendants regarding removal of the inactive violations so that she may list the property for sale. (*Id.* at 10.) Defendants informed the Real Estate Agent that no action would be taken on the violations but that they would also not be removed until resolved. (*Id.*)

B. Procedural History

On June 13, 2006, Plaintiff filed a Complaint in Santa Cruz County Superior Court alleging five causes of action: (1) Declaratory relief regarding the code violations; (2) Taxpayer injunction pursuant to Cal. Civ. P. Code §§ 526 and 526a; (3) Inverse condemnation in violation of the Fifth and Fourteenth Amendments and the California Constitution; (4) Fraud; (5) Violation of Civil Rights under 42 U.S.C. § 1983; and (6) Conflict of interest and violation of separation

of powers. On July 10, 2006, Defendants removed the action to the Northern District of California.

Presently before the Court is Defendants' Motion for Summary Judgment.

III. STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying the evidence which it believes demonstrates the absence of a genuine issue of material fact." *Id.* at 323, The non-moving party must then identify specific facts "that might affect the outcome of the suit under the governing law," thus establishing that there, is a genuine issue for trial. Fed. R. Civ. P. 56(e).

When evaluating a motion for summary judgment, the court views the evidence through the prism of the evidentiary standard of proof that would pertain at trial. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986). The court draws all reasonable

inferences in favor of the non-moving party, including questions of credibility and of the weight that particular evidence is accorded. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1992). The court determines whether the non-moving party's "specific facts," coupled with disputed background or contextual facts, are such that a reasonable jury might return a verdict for the non-moving party. *T.W. Elec. Serv. v. Pac. Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). In such a case, summary judgment is inappropriate. *Anderson*, 477 U.S. at 248. However, where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

IV. DISCUSSION

Defendants move for summary judgment on the ground that Plaintiffs have failed to exhaust administrative remedies. (Motion at 10.) Since Plaintiffs' federal claims are brought under 42 U.S.C. § 1983 for alleged violation of the takings clause of the Fifth Amendment and related violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Court examines the exhaustion requirements through those legal principles.

As a general rule, "exhaustion of state administrative remedies is not a prerequisite to an action under § 1983." *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir, 2007) (citing

Patsy v. Bd. of Regents, 457 U.S. 496, 507 (1982)). However, since "the Takings Clause only prohibits the taking of property without just compensation, a takings claim is not ripe until the claimant has pursued and been denied just compensation under the applicable state compensatory procedures." *Outdoor Media*, 506 F.3d 895, 900 (9th Cir. 2007). "Under federal law[,] the general rule is that claims for inverse taking, and for alleged related injuries from denial of equal protection or denial of due process . . . are not matured claims until planning authorities and state review entities make a final determination on the status of the property." *Norco Const., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). "A final decision requires at least: (1) a rejected development plan, and (2) a denial of a variance." *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988).

In this case, there has been no formal adjudication of the alleged building code violations on Plaintiffs' property.

The evidence shows that on November 15, 1999, Defendants notified Plaintiffs that an administrative hearing would be scheduled regarding the code violations. (Dever Decl., Ex. L.) However, the notice did not specify a hearing date. (*Id.*) The notice also detailed the steps that would be required to correct the code violations. (*Id.*) On January 3, 2000, Defendants sent Plaintiffs a letter stating that they had not received the additional information requested regarding the Application. (Dever Decl., Ex. M.) The

letter further stated that the Application would be considered abandoned unless the additional information was received by January 24, 2000.

On January 31, 2000, Defendants sent Plaintiffs' consultant a letter which stated that the Application was considered abandoned because some but not all of the additional material had been submitted. (Dever Decl., Ex. N.) The letter further stated that Plaintiffs could submit a response to the Planning Director explaining why certain information was not submitted. (*Id.*) Plaintiffs submitted such a letter on February 4, 2000. (Dever Decl., Exs. O-P.) On March 13, 2000, the Planning Director reinstated the Application. (Dever Decl., Ex. Q.) The Planning Director also requested four additional pieces of information regarding Briarcliff farms. (*Id.*) Between March and June 2000, Plaintiffs' expert and Defendants attempted to schedule a meeting to resolve the outstanding issues. (Dever Decl., Exs. R-S.)

On August 21, 2001, Defendants sent Plaintiffs a Stipulation and Order ("Stipulation") which set forth a proposed resolution of the code violations and Plaintiffs' Application. (Dever Decl., Ex. T.) On October 2, 2001, Plaintiffs sent Defendants a letter requesting revisions to the Stipulation. (Hill Decl., Ex, G.) On May 22, 2002, Defendants declined to adopt Plaintiffs' revisions. (*Id.*, Ex. H.)

Defendants scheduled an administrative hearing for July 11, 2002. (*Id.*) Plaintiffs requested a continuance of the hearing due to their attorney's unavailability. (Hill Decl., Ex. I. at 1.) It is not clear from the record whether a continuance was expressly granted, but it appears that no hearing was held on July 11, 2002. On December 2, 2002, Plaintiffs requested an Administrative hearing. (*Id.* at 2.) Plaintiffs requested an independent hearing officer to be appointed through the city of Santa Cruz's Office of Administrative Hearings. (*Id.*) Defendants responded that they would use the County's administrative hearing officer, Teresa Shook, unless Plaintiffs objected; if Plaintiffs objected, an alternate hearing officer would be selected. (*Id.* at 3) The hearing was scheduled for February 14, 2003. (*Id.*) On December 31, 2002, Plaintiffs requested additional information regarding the selection of Teresa Shook and the history of her work for the County. (*Id.* at 4.) It does not appear from the record that such information was ever provided. The administrative hearing was never held. (Motion at 5; Opposition at 8.)

In addition, the evidence shows that Plaintiffs applied for a development permit to resolve the violations, but abandoned that application in 2001, (Motion at 5; Falconer Decl. at 197-198.) It is not clear whether the application was abandoned due to Plaintiffs' negligence or in light of the parties' contemporaneous negotiations regarding a stipulated settlement. The evidence also shows that an Administrative hearing to formally adjudicate the validity of

the alleged violations was last scheduled for February 14, 2003, but never took place. Plaintiffs offer no explanation for why they did not pursue the administrative hearing or complete their Application for a development permit; nor do they provide evidence that Defendants denied them these procedures. Until Plaintiffs request an administrative hearing or apply for a permit, and are either denied or given an unfavorable ruling, their claims are not ripe for adjudication.

Accordingly, the Court GRANTS Defendants' Motion for Summary Judgment on the ground of failure to exhaust administrative remedies.

V. CONCLUSION

The Court GRANTS Defendants' Motion for Summary Judgment, The case is DISMISSED without prejudice to refiling when and if Plaintiffs exhaust their state proceedings.[6]

Each party shall bear their own fees and costs. The Clerk shall close the file.

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[6] *See Gould v. County of Mendocino*, 2000 WL 1346787 at *4 (N.D. Cal. 2000) (holding that plaintiffs' substantive due process claim is an unripe takings claim and therefore dismissing without prejudice to refiling should plaintiffs exhaust their local/state proceedings).

Dated: October 24, 2008 /s/ James Ware
JAMES WARE
United States District
Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: October 24, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HILLARY L. FALCONER; D.W. FALCONER, INC., DBA Briarcliff Farm, Plaintiffs-Appellants, v. COUNTY OF SANTA CRUZ; COUNTY OF SANTA CRUZ BOARD OF SUPERVISORS; JANET K. BEAUTZ; DAVID LAUGHLIN; RICHARD NIEWSTAD; NANCY COLE, Defendants-Appellees.	No. 08-17661 D.C. No. 5:06-cv-04240-JW Northern District of California, San Jose ORDER (Filed Apr. 2, 2010)

Before GOODWIN, BERZON and IKUTA, Circuit Judges.

Judge Goodwin has recommended denying Appellant's petition for rehearing en banc, and Judges Berzon and Ikuta have voted to deny the en banc petition.

The full court has been advised of the Petition for Rehearing En Banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing En Banc is DENIED.